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OCTOBER TERM, 2004

MCCREARY COUNTY, KENTUCKY *et al.*, *Petitioners*

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY *et al.*, *Respondent*

On Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, THE HORACE MANN LEAGUE AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI*[1]

The National School Boards Association (NSBA) is a federation of 49 state school boards associations, the Hawai'i State Board of Education, and the school boards of the District of Columbia and the U.S. Virgin Islands. NSBA represents the 95,000 school board members who serve America's 15,000 public school districts and more than 47 million public school students. NSBA is dedicated to the improvement of public education in America.

The Horace Mann League was founded by a group of leading educators in 1922. According to the League's beliefs, our public schools should be free, classless, nonsectarian, and open to all children of all of the people. The schools should be dominated by such purposes as will ensure the preparation of children and youth for effective citizenship in our democracy.

The National Association of Secondary School Principals (NASSP)—the preeminent organization and the national voice for middle level and high school principals, assistant principals and aspiring school leaders—provides its members the professional resources to serve as visionary leaders. NASSP promotes the intellectual growth, academic achievement, character development, leadership development, and physical well-being of youth through its programs and student leadership services. NASSP sponsors the National Honor Society™, the National Junior Honor Society™, and the National Association of Student Councils™.

Amici have a longstanding interest in the effective development and implementation of local school board

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[1] This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their members and counsel made any monetary contribution to the preparation or submission of this brief.

policies, including those assuring compliance with the Establishment Clause. They have participated in efforts to find reasonable common ground regarding issues of religion in public schools. Included in those efforts is submission of *amici curiae* briefs to this Court in 11 cases on issues involving religion in the public schools.

For many years, *Amici* have supported the constitutional principle of the separation of church and state. On the question of the posting of the Ten Commandments, public schools are not of one mind. Some believe that displaying this document adds an appropriate historical context to the study of American law and government. Others believe that any such posting would cross the line, introducing a clearly religious document into the public arena. Because of this philosophical disagreement, *Amici* do not take a position on the merits of the posting of the Ten Commandments in public buildings. Regardless of the lack of consensus on this specific issue, *Amici* believe that this case provides a prime opportunity for the Court to set forth a unified standard of analysis in Establishment Clause cases affecting public schools.

SUMMARY OF THE ARGUMENT

The conflict and confusion in the courts as to which Establishment Clause analysis to apply and how to apply it have caused great chaos and confusion for communities, public school administrators, and board members when questions regarding the role of religion in public schools arise. Questions regarding the role of religion in public schools are pervasive and frequent across the nation. *E.g.*, How much religious music can be included in a school concert? How may schools recognize religious holidays? Can students distribute religious flyers in school? How far can teachers go in professing their personal religious beliefs within the school? Every

day public school administrators and board members across the nation face these questions. Every day their decisions are challenged by interest groups who choose to use the schools as their forum to clarify the boundaries of religious rights and individual liberties. By setting forth a clear and consistent analysis for use in Establishment Clause cases, this Court would help minimize these disputes and the ensuing litigation that plague our nation's schools.

Amici urge this Court to adopt the "endorsement analysis" as the overarching framework for Establishment Clause cases. Consistent use of the endorsement analysis would assist public school administrators and board members since it retains the concepts of purpose and effect, concepts clearly derived from the *Lemon* test. However, it provides some much needed clarifications. It focuses on the actual and perceived purpose and effect of the activity in question. Secondly, it provides flexibility by using the "reasonable observer" standard. Finally, it recognizes the concept that no individuals should feel they are not full members of our nation due to their religious beliefs, which is critically important to the relationship between students and the public schools. This Court's clear adoption of this analysis would help public schools handle Establishment Clause issues in a way that respects the relationship between school and student and recognizes the "dizzying religious heterogeneity" of our nation. *Newdow*, 124 S.Ct. at 2321.

Currently, the intersection of public schools and religious faith is legally and politically fraught with peril. Clarity and consistency are needed to guide public school administrators' and board members' decision-making and actions on the appropriate role of religion in the public schools. Clarity and consistency are needed to provide a clear standard against which their decisions and actions can be measured. This would offer credibility to their decisions and actions. Clarity and consistency from this

Court could build a consensus within the nation on the appropriate role of religion in our public schools and thereby reduce the disputes and ensuing litigation that encumber our nation's public schools.

ARGUMENT

I. The erosion of the *Lemon* test has deprived public school administrators and board members of the clear guidance they need in Establishment Clause cases.

The Establishment Clause has been well litigated over the 33 years since this Court handed down its seminal decision of *Lemon v. Kurtzman* in 1971. Many of these decisions have dealt with establishment of religion within the context of elementary and secondary education.[2]

[2] *Lemon v. Kurtzman*, 411 U.S. 192 (1971); *Sloan v. Lemon*, 413 U.S. 825 (1973) (Statutes providing tuition reimbursement to parents of students in nonpublic school violated Establishment Clause.); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (Maintenance and repair grants to nonpublic schools and tax benefits to parents with children enrolled in nonpublic schools impermissibly advance religion.); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (Statute which provided for reimbursement of nonpublic schools for expenses of certain tests but included no means to ensure tests were free of religious instruction violated Establishment Clause.); *Meek v. Pittenger*, 422 U.S. 1049 (1975) (Direct loan of instructional materials and equipment to nonpublic schools and provision of certain auxiliary services for students in nonpublic schools violate Establishment Clause; lending textbooks to children in nonpublic schools is constitutional; overruled in part by *Mitchell v. Helms*); *Wolman v. Walter*, 433 U.S. 229 (1977) (Loan of textbooks to private school students and providing standardized tests, scoring services, speech and hearing diagnostic services in the nonpublic schools and therapeutic services at a neutral site are constitutional; provision of instructional materials and equipment and unrestricted transportation and services for field trips are unconstitutional; overruled in part by *Mitchell v. Helms*); *Stone v. Graham*, 449 U.S. 39 (1980) (Posting of the Ten Commandments in public school classrooms violates the Establishment Clause.); *New York v. Cathedral Acad.*, 434 U.S. 125 (1977); *Committee For Pub. Educ. v. Regan*, 444 U.S. 646 (1980) (Cash reimbursement to private religious schools for cost of administering and grading of state written tests does not violate the Establishment Clause.); *Mueller v. Allen*, 463 U.S. 388 (1983) (Allowing deductions from state income tax for educational expenses incurred by parents of elementary and secondary school students does not violate Establishment Clause.); *Lynch v. Donnelly*, 465 U.S. 668 (1984)(Inclusion of crèche in city's Christmas display does not violate Establishment Clause.); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Moment of silence statute intended to bring prayer into classroom violated Establishment Clause.); *Aguilar v. Felton*, 473 U.S. 402 (1985) (Placing public school teachers in private religious schools to provide remedial services under federal statute violates Establishment Clause.); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (School district violated Establishment Clause by paying private religious school teachers to teach private school students on religious school premises and sending public school teachers to private schools to teach supplemental courses.); *Bender v. Williamsport*, 475 U.S. 534 (1986)(Individual school board member lacked standing to challenge court order that district grant access to religious group to meet on school grounds.); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (State statute requiring teaching of creation science violated Establishment Clause.); *Bowen v. Kendrick*, 487 U.S. 589 (1988)(Giving federal grants to religious organizations to provide adolescent counseling does not violate Establishment Clause.); *Westside Cmt'y. School v. Mergens*, 496 U.S. 226 (1990) (Equal Access Act does not violate Establishment Clause.); *Lee v. Weisman*, 505 U.S. 577 (1992) (Practice of clergy led prayer at high school graduation violates Establishment Clause.); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (Allowing religious film to be shown on school premises after school hours does not violate Establishment Clause.); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (State's provision of sign language interpreter to student attending a parochial school does not violate Establishment Clause.); *Kiryas Joel Vill. School Dist. v. Grumet*, 512 U.S. 687 (1994) (Establishment of a school district along religiously distinct geographic lines violates the Establishment Clause.); *Agostini v. Felton*, 521 U.S. 203 (1997)(Providing Title I remedial services to students on sectarian school premises does not violate Establishment Clause.); *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000) (Prayer over the loud speakers at high school football games violates the Establishment Clause.); *Mitchell v. Helms*, 530 U.S. 793 (2000) (Loan of state funded educational materials to parochial schools does not violate Establishment Clause.); *Good News*

Consensus in these cases is rare. Of the 28 public school cases, only two were unanimous, ten were 5 to 4 decisions, and seven were decided by a plurality of this Court. In all, these cases have yielded over 100 written opinions of the Justices. Needless to say, these opinions do not offer clear guidance to public school administrators and board members.

The three-pronged analysis of the "*Lemon* test"[3] has been accepted as the primary mode of analysis for Establishment Clause cases. However, courts have struggled to apply it consistently, yielding sometimes disparate and unpredictable results. This Court has also found the application of the *Lemon* test problematic, applying the prongs in various manners and with inconsistent emphasis.

The primary purpose prong of *Lemon* has in general not been rigorously scrutinized. In fact, this Court has, in most cases, accepted the stated secular purpose at face value. However, in several public

v. Milford Cent. School, 533 U.S. 98 (2001) (School policy prohibiting religious groups from using school facilities after hours is not required by the Establishment Clause.); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Grant of private school vouchers, which includes tuition vouchers for parochial schools, does not violate Establishment Clause.); *Elk Grove Unified School Dist. v. Newdow*, __ U.S. __, 124 S. Ct. 2301 (2004) (Non-custodial parent lacks standing to bring Establishment Clause challenge to school policy requiring recitation of Pledge.).

[3] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court struck down a statute providing salary supplements for teachers in private schools, salary reimbursement for private school teachers, and instructional materials. This Court consolidated the criteria that had been developed in previous cases to determine whether a government program establishes religion. The analysis that emerged considers whether: 1) the program has a secular legislative purpose, 2) the primary effect neither advances nor inhibits religion, and 3) the program does not foster an excessive entanglement between government and religion. *Lemon*, 411 U.S. at 612–613.

education cases,[4] this Court has closely scrutinized the asserted purpose of a challenged practice and found no secular purpose for the statutes challenged. This Court disregarded the secular purpose stated by the governmental entity and searched for actual motives on the part of the state. Two of the three opinions reversed the trial court's determination of a secular purpose. Justice Rehnquist's dissent in the earliest of these cases, *Stone v. Graham*, took issue with the "summary rejection of a secular purpose articulated by the legislature and confirmed by the state court." 449 U.S. at 43 (Rehnquist, J., dissenting.) He argued, in essence, that the courts should not supplant their self-determined purpose of the legislation for the legislature's stated purpose.

The effects prong has proved similarly problematic in application, especially in the public school context where the effects of a particular policy or practice are both secular and sectarian. In such cases, the courts have not clearly indicated how much of a sectarian effect must be present to invalidate a provision. In every school aid case, it is apparent that any functional assistance to parochial education frees other dollars for use in support of the school's religious mission. Furthermore, any assistance to parents, such as tax credits or tuition vouchers, results in increased enrollment in parochial

[4] *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 578 (1987); and *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000). The *Lemon* test was not at the core the decision in *Santa Fe*. Rather, this Court used a number of analyses to strike the district policy. First, it was determined that the prayer was not private speech as claimed by the respondent. Second, the policy was held to be coercive since some students must attend games for class credit. Third, it was determined that the policy would lead reasonable observers to perceive that the school endorsed the religious activity. Finally, the Court found that the long-standing practice of public prayer at football games had an unconstitutional religious purpose.

schools, thus benefiting religion to some degree. Yet such practices have been upheld by this Court, characterizing such aid as having an incidental, rather than a primary, effect of promoting religion. This Court has pointed out that where aid flowing to religious organizations results from private individual decisions, rather than state action, the primary effect is not the governmental advancement of religion.

The excessive entanglement prong has also proven difficult to apply in practice in the public school context. The Establishment Clause requires the state to see that public funds are not spent for religious purposes. Yet, the type of recordkeeping or monitoring that the Establishment Clause appears to require in K-12 settings is just the type of surveillance that is forbidden under the excessive entanglement prong. Furthermore, there is a potential for excessive entanglement when religion creates political divisiveness by making some citizens feel they are "outsiders" because of their religious affiliation. There are few contexts where the appropriate role of religion in public life has engendered more divisiveness among citizens than in the public schools, making it virtually impossible for education officials to take any action that is not viewed by one side or the other has crossing the constitutional line.[5] This a particularly

[5] For example, the following conflicts have been reported in the media recently (some of the same conflicts arise in many districts across the nation) : whether an elementary student could distribute candy canes with a religious message attached to her classmates; whether the content of a student's graduation speech was too religious; whether bricks inscribed with crosses could be placed on a sidewalk as part of a parents' fundraiser; whether a minister could post flyers promoting parenting seminars at his church on the school's bulletin board; whether schools may exclude flyers promoting activities at religious institutions from distribution in students' weekly communications packets; whether a school could require a teacher's aide to stop wearing a necklace with a cross on it on the outside of her garments; whether a school district is required to provide bus transportation to

troubling phenomenon since public schools' very mission involves fostering a sense of unity and commitment to understanding and tolerance among all members of hugely diverse communities.

The intrinsic problems in the application of *Lemon* to public education as well as underlying differences in constitutional philosophy have led to criticism by this Court of the *Lemon* analysis, beginning in the 1980s. For example, Chief Justice Rehnquist expressed his reservations in *Wallace v. Jaffree*, 472 U.S. at 107–113 (Rehnquist, C.J. dissenting), outlining his interpretation of the history of religious freedom in the United States,

students attending religious schools; whether students could sing a hymn at graduation ceremonies without substituting the word "God" with the word "Him" in the song; whether the district is required to review all student graduation speeches to ensure they do not contain prayer or proselytizing language; whether the school has to establish a Fellowship of Christian Athletes at the high school; whether a student may perform a song entitled "The Prayer"; whether the local school board may begin its meeting with a prayer; whether the school district must accept student service in the form of religious worship to fulfill the school's community service requirement; whether the school district's holiday which includes a menorah must also include a crèche; whether teachers may include the teaching of other cultures and religious beliefs in their lessons; may schools prohibit the reading of religious texts during student's oral reading assignments; whether students may distribute religious messages within the school; whether the school must allow religious organizations use of school facilities outside the school day; whether school districts may charge a fee for religious organization's use of school facilities outside the school day; whether the state may require home schooling parents to notify the state department of education of their curricula; whether a school may allow a student to fulfill his senior project by conducting a Bible study class; whether a school district can collaborate with religious institutions to provide services to students outside the school day; whether a school may have Halloween celebrations including the wearing of costumes and distribution of candy during the school day; whether a student may distribute a statement of her religious beliefs to her classmates during the school day. Accessed from COSA School Law Issues Page, religion, news, available at http://www.nsba.org/site/page.asp?TRACKID=&CID=469&DID=8754

and arguing that this Court's previous rulings in this area have been based on a misinterpretation of history. Concluding that the Establishment Clause was only intended to prohibit a national church and prohibit preference between denominations, he urged the abandonment of the metaphor of the "wall of separation" and contended that the *Lemon* analysis was unworkable. Justice Scalia has often similarly criticized the *Lemon* test and has repeatedly sought its abandonment.[6] As stated in response to the Court's application of the *Lemon* test in one case:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* [citations omitted] conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.

[6] *E.g., Lee v. Weisman*, 505 U.S. 597 (1992); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Kiryas Joel Vill. School Dist. v. Grumet*, 512 U.S. 687 (1994).

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. at 400 (Scalia, J. concurring).

In addition to direct criticisms of the *Lemon* test, Justices have dealt with the shortcomings of *Lemon* by developing additional analyses. By denigrating *Lemon's* flaws and crafting new Establishment Clause analyses, this Court has clearly signaled its lack of confidence and consequently caused disarray among lower courts and confusion among public school administrators and board members who scramble for clear guidance to inform their decision-making and practices in this difficult area. For example, the court in *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997), *cert. denied,* 524 U.S. 953 (1998), called upon to decide the constitutionality of the use of Christian music for a high school choir's performance, declared Establishment Clause jurisprudence "muddled." It viewed the "vigorous attack" that had been waged against *Lemon* by the Justices of the Supreme Court and commentators alike as causing "uncertainty. . .regarding the appropriate Establishment Clause analysis. " Because the endorsement analysis has gained wider acceptance among the Justices than any other analysis, the Tenth Circuit ultimately chose to apply the purpose and effects components of the endorsement analysis together with the entanglement criterion imposed by *Lemon* (although it doubted the workability of the purpose prong in any of its iterations).

This Court itself had acknowledged the lack of clarity in this line of cases many years ago in *Regan* when it said:

> Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is

> that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the State—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

Regan, 444 U.S. at 662.

Without a clear framework for Establishment Clause analysis applicable to elementary and secondary education, schools have faced increasing litigation from both sides—those claiming schools are hostile to religion and those asserting that schools are foisting state approved religion on their students.[7] As one commentator put it: "the high court's reluctance—or inability, some say—to settle on a single approach to weighing Establishment Clause violation will continue to

[7] As noted in *Elk Grove v. Newdow*, "The citizens of this Nation have been neither timid nor unimaginative in challenging government practices as forbidden 'establishments' of religion. See, e.g., *Altman v. Bedford Central School Dist.*, 245 F.3d 49 (C.A.2 2001) (challenging, among other things, reading of a story of the Hindu deity Ganesha in a fourth-grade classroom); ... *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (C.A.9 1994) (high school biology teacher's challenge to requirement that he teach the concept of evolution); *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680 (C.A.7 1994) (challenge to school supplemental reading program that included works of fantasy involving witches, goblins, and Halloween); ... *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (C.A.9 1985) (challenge to use of *The Learning Tree*, by Gordon Parks, in high school English literature class). *Elk Grove v. Newdow*, 124 S.Ct. at 2324 (O'Connor, J. concurring).

fuel already persistent and creative litigation regarding the separation of church and state."[8]

Jurists, academics, and practitioners facing new Establishment Clause challenges are left in a quandary when it comes to sorting through this line of cases for guidance. This uncertainty leaves public school administrators and board members at a disadvantage, forcing them to navigate this complex maze when setting policies and procedures and when making daily decisions applying these policies to actual situations that arise. Because there is little consistency, no clear standard against which to measure their decisions, and no public consensus on these issues, their decisions often lack credibility. No matter what decisions they make, they are regularly challenged. Public school administrators and board members are at the mercy of advocates who use the current legal confusion to twist and test the limits of the Establishment Clause in creative ways.[9] One researcher who interviewed representatives of the many litigation groups that target public schools on these issues found that these otherwise contentious respondents did all agree on at least one thing.[10] In

[8] *Justices Struggle with a "Lemon"* NATIONAL LAW JOURNAL (July 3, 2000).

[9] *E.g.*, In December, 2004 the Alliance Defense Fund (ADF), an advocacy group, sent a legal memorandum to communities, attorneys, and school districts nationwide, setting forth their interpretation of the Establishment Clause and justifying the observance and celebration of Christmas within the public schools. "The phrase separation of church and state is not in the U.S. Constitution. Yet, by intimidation and disinformation, groups like the ACLU tried to silence all Christians' religious expression." They are offering the services of *pro bono* attorneys to communities who wish to pursue litigation on the issue. Press story available at http://www.theunion.com/article/20041130?NEWS/111300040.

[10] Dr. Joan DelFattore, Bowen Lecture in Education Policy, George Mason University (April 27, 2004).

roughly one third of the controversies over religion in public schools, they say nothing school officials do would stave off litigation—their only choice is which side they want to sue them.[11] Thus this confusion increases the burden on schools and diverts educators' focus from learning to litigation.

Even Justices within this Court have recognized the dilemma in which public school administrators and board members are left. As stated by Justice Scalia: "Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional." *Edwards v. Aguillard*, 482 U.S. 587, 636 (Scalia, J., dissenting). Although the *Lemon* test has been neither formally overruled nor abandoned, its application has become intermittent and uncertain. This Court has not strictly applied the *Lemon* test. In addition to *Lemon*, in public school cases this Court has used three alternative analyses: endorsement, neutrality, and coercion; thus calling into question *Lemon*'s authority and continuing vitality. This state of affairs, while undoubtedly a boon to the advocacy groups' political and fundraising efforts, comes at considerable cost to the nation's schools, school children, taxpayers, and the social fabric.

[11] For example, the following conflicts have arisen recently wherein the school was left in a Catch-22 when their practice is challenged from both political sides as reported in the media: whether the school is required to or is required not to offer a course in its history or literature curricula on the Bible; whether the school must or may not recognize Good Friday as a holiday; whether the school must or may not allow the distribution of Bibles by a local service organization; whether a school must or may not include a disclaimer regarding evolution as a theory, not fact, in the front of science textbooks. Accessed from COSA School Law Issues Page, religion, news: http://www.nsba.org/site/page.asp?TRACKID=&CID=469&DID=8754

II. A clear and consistent Establishment Clause analysis is an imperative in light of the role public schools play in our nation and in the lives of students.

Throughout the long history of Establishment Clause litigation, this Court has drawn a distinction between activities that occur within and outside the context of K-12 education because of the role public schools play in our nation and in the lives of students.[12] As stated in *Aguillard,* 482 U.S. at 583-584:

> This Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. [citations omitted] The State exerts great authority and coercive power through mandatory attendance requirements and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. [citations omitted] Furthermore, the "public school is at once the symbol of our democracy and the

[12] *E.g., Grand Rapids*, 473 U.S. at 383 ("We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children."); *Aguillard*, 482 U.S. at 583 ("In this case the Court must determine whether the Establishment Clause was violated in the special context of the public elementary and secondary school system.").

> most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools." *Illinois ex rel. McCollum v. Board of Education* 333 U.S. 203, 231 (1948) (Frankfurter, J.).

In the field of public school law, this Court has been asked to address the constitutional rights of students in many situations. In doing so, this Court has taken into consideration the unique role the public schools play in the lives of students, drawing a distinction between the state acting as government and the state acting as an educational institution. The relationship between government and citizen is different from the relationship between the state as public school and student. As stated when this distinction was first directly addressed: "First Amendment rights, applied in light of special characteristics of the school environment, are available to teachers and students." *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 506 (1969). The special characteristics considered are the nature of the activity being conducted in the school, *i.e.*, education, the age and maturity of the student involved, the need for the school to maintain discipline, and the mission of the school to inculcate values and teach appropriate behavior.

School officials are expected to educate, protect, and inculcate values. It is the nature of this relationship that causes the heightened concern in Establishment Clause cases. The treatment students receive within the public school has a profound impact on their lives and their view of our nation and its values. No child should be left to wonder if he or she is a full citizen in our nation's public schools. Consistent with the dictates of the Establishment Clause, no student should feel an outsider

because of his or her religious beliefs.[13] Because it is the role of the schools to educate students, inculcate values, and protect them, when the school even slightly favors a religion, or any religion, there is a great danger of establishment of religion.

The need for clear and consistent Establishment Clause analysis is no more apparent than in cases where schools must balance the free speech rights of students and faculty with their obligation to maintain separation of church and state. Recognizing the special influence that schools wield over the minds and lives of their students, school policies often seek to limit religious expression during school-sponsored activities and on school premises, citing Establishment Clause concerns. But such decisions are frequently challenged as violating the free speech rights of those who wish to express the religious message. In deciding these cases, courts have used a jumble of the current Establishment Clause standards to arrive at opposite conclusions in factually similar situations.[14]

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[13] "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' *Lynch*, 465 U.S. at 688 (O'Connor, J. concurring.)" *Sante Fe v. Doe*, 530 U.S. at 309–310.

[14] *Compare Seidman v. Paradise Valley Unified School Dist.*, 327 F.Supp.2d 1098 (D. Ariz. 2004) (finding parental inscriptions with religious content on wall tiles in elementary schools would not be perceived as endorsement of religion and that excluding such messages would violate parents' free speech rights) and *Fleming v. Jefferson County School Dist. R-1*, 298 F.3d 918 (10th Cir. 2002) (finding messages on wall tiles in high school would be viewed as school-sponsored speech and therefore school could bar religious messages based on legitimate pedagogical interest in avoiding religious debate, although an Establishment Clause defense alone would have been insufficient).

Public school administrators and board members cannot be left without clear guidance on these daily issues. They need a clear and consistent analysis to guide their decision-making so they can act with a degree of certainty and credibility.

III. A clear and consistent Establishment Clause analysis is a growing imperative in light of the increasing diversity and religious divisiveness in the nation and particularly in the public schools.

The need for a clear and consistent analysis is especially important given the increasing diversity in today's public schools. By the year 2040 "minorities" are projected to represent more than half of America's K-12 student population.[15] This diversity encompasses not only racial and ethnic differences but also a broad spectrum of religious backgrounds, beliefs, and practices. Not surprisingly, there has been a corresponding push to increase the diversity of cultural and religious views presented,[16] acknowledged, and even accommodated in schools.

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[15] *See* L. Olson, *Ed. Week*, Sept. 27, 2000 at 34–35; J. Hansen, 21st Century School Finance: How is the Context Changing Education Commission of the States (2000) at http://ecs.org/clearinghouse/28/04/2804.htm.

[16] Many schools are now trying to incorporate the perspectives of many cultures and world religions into their curricula. W. Nord & C. Haynes, *Taking Religion Seriously Across the Curriculum*, Association for Supervision and Curriculum Development (1998). This push is coming from parents, community members, and educators. The National Center for History in the Schools (NCHS) lists religion as a critical element in the curriculum and recommends the study of Christianity, Confucianism, Daoism, Brahmanism and Hinduism in world history classes for grades 5-12 and the "study [of] religions that are representative of the modern population in order to understand religious diversity and its impact on American institutions and values" in American history classes. *National Center for History in the*

This growing diversity is already reflected in the legal questions administrators and school attorneys face. For example: Can schools offer comparative religion courses? Must the school honor a Jehovah Witness's request to be placed in the custody of another Jehovah Witness family while on a school trip to continue his religious education? Are schools required to excuse Muslim students for extended Friday prayer services? Must schools provide Muslim students with a private place within the school to conduct Friday prayer services? May they provide this private place for prayer for only Muslim students? Can a Druid student be exempted from a school uniform policy on the basis of religious beliefs? Can a Muslim student be exempted from a school uniform policy on the basis of religious beliefs? Must a female Muslim student be exempted from the athletic association's uniform policy on the basis of religious beliefs? Are school officials required to allow students to opt out of classes, such as music and physical education, based on students' religious beliefs? How do schools inquire as to the tenets students' religious beliefs for the purposes of accommodation? [17]

As public schools become more diverse in culture and religion, they must accommodate individuals and their needs and requests in a way that complies with First Amendment principles. Without a clear and consistent analysis to guide their decision-making, public school administrators and board members are left to guess at their peril as to what may or may not be acceptable from a constitutional perspective. If there is

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Schools, National Standards for History, accessed at http://www.sscnet.ucla.edu/nchs/standards/.

[17] All of these issues have been discussed recently on a school attorneys' email group (where public schools attorneys seek the advice of their peers on current issues arising in their practice). Member access to these archived discussions can be found at: http://spirit.sparklist.com/cgi-bin/lyris.pl?enter=cosa.

no clear and consistent analysis to guide or explain their actions, they will certainly be challenged at every turn. Leaving them in a state of uncertainty can only result in more litigation and less education.

IV. This Court's adoption of the endorsement analysis has the potential to bring clarity to Establishment Clause jurisprudence related to public education.

Amici urge this Court to adopt the endorsement analysis that has emerged from Justice O'Connor's *Lynch v. Donnelly*[18] concurrence as the overarching framework for Establishment Clause analysis. Consistent use of the endorsement analysis would assist public school administrators and board members since it retains the concepts of purpose and effect, concepts clearly derived from *Lemon*. However, it is an improvement in that it employs some much needed clarifications. It focuses on the actual and perceived purpose and effect of the activity in question. Secondly, it provides flexibility by use of the "reasonable observer" standard. Finally, it encompasses the concept that no individual should feel they are not full members of our nation due to their religious beliefs, which is critically important to the relationship between students and the public schools. This Court's clear adoption of this analysis would help public schools handle Establishment Clause issues in a way that respects the relationship between school and student and recognizes the "dizzying religious heterogeneity" of our nation. *Newdow*, 124 S.Ct. at 2321 (O'Connor, J. concurring).

[18] This Court held in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that including a nativity scene as part of a city Christmas display was constitutional. Using a summary treatment of the *Lemon* analysis, this Court found that the crèche posed no real danger of establishment of religion because it was merely a passive symbol presented in the context of other symbols of the season.

The workability of the endorsement analysis has been demonstrated in several cases where this Court has applied the O'Connor endorsement modification to the elementary and secondary school context.[19] A majority adopted the endorsement analysis as to the purpose prong in *Wallace v. Jaffree* and *Edwards v. Aguillard*. The analysis was stated as "whether the government's actual purpose is to endorse or disapprove of religion." 472 U.S. at 56 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (O'Connor, J. concurring)); *Aguillard*, 482 U.S. at 578. Justice O'Connor, writing for the majority in *Agostini v. Felton*,[20] employed a modified *Lemon* analysis.[21] Up to now, this use of the endorsement analysis might be viewed as creating a separate line of reasoning, while never clearly repudiating the *Lemon*

[19] *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Stevens, J., O'Connor, J.); *Aguilar v. Felton*, 473 U.S. 402 (1985) (Stevens, J., O'Connor, J.); *Grand Rapids v. Ball*, 473 U.S. 373 (1985) (Stevens, J., O'Connor, J.); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Stevens, J., O'Connor, J.); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (Brennan, J., Marshall, J., Blackmun, J., Stevens, J.); *Westside v. Mergens*, 496 U.S. 226 (1990) (Rehnquist, C.J., O'Connor, J.); *Lee v. Weisman*, 505 U.S. 597 (1992) (Stevens, J. O'Connor, J., Souter, J.); *Lamb's Chapel v. Center Moriches*, 508 U.S. 384 (1993) (Rehnquist, C.J., Stevens, J. O'Connor, J., Souter, J.); *Santa Fe v. Doe*, 530 U.S. 290 (2000) (Stevens, J., O'Connor, J., Kennedy, J., Souter, J., Ginsburg, J., Breyer, J.); *Good News v. Milford*, 533 U.S. 98 (2001) (Scalia, J., Souter, J., Thomas, J., Ginsburg, J., Breyer, J.); *Elk Grove v. Newdow*, __ U.S. __, 124 S.Ct. 2301 (2004) (O'Connor, J concurring).

[20] 521 U.S. 203 (1997), overruling *Aguilar v. Felton*, 473 U.S. 402 (1985). This Court in *Agostini* did not specifically adopt the endorsement analysis, nor did it specifically reject the *Lemon* analysis. It held that the government program had a secular purpose and did not have a primary effect of advancing religion, but excessive entanglement was subsumed as a part of the primary effect analysis.

[21] In *Mitchell* this Court split on the interpretation of the analysis set forth in *Agostini*. The Court upheld a government program that gave educational materials to private (including religious) schools in a plurality, not a majority opinion, with Justice O'Connor writing a concurring opinion.

test. Clear adoption of the endorsement analysis by this Court would help alleviate the confusion in this area of the law.

The endorsement analysis encompasses both the purpose and effect of the practice in question. "The purpose of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid." *Id.* at 690 (O'Connor, J. concurring).

Under the endorsement analysis, the inquiry shifts from whether there is a secular purpose to whether government has given its stamp of approval to a particular religious practice or belief. The endorsement analysis allows government to consider religion in making the law. But if by enacting a statute, the state intends to send a message of endorsement of religion, the statute is unconstitutional, regardless of whether it also has a secular purpose.

Lemon's second prong, requiring that a statute's effect must neither advance nor inhibit religion, is altered under the endorsement modification to determine whether a statute, regardless of its legislative intent, in fact, conveys a message of endorsement. This Court explained that an action will be found unconstitutionally to advance religion if "it conveys a message of government endorsement or disapproval of religion." *Grand Rapids,* 473 U.S. at 389. If such a message is conveyed, it would be an impermissible symbolic union of church and state. "This effect—the symbolic union of

government and religion or sectarian enterprise—is an impermissible effect under the Establishment Clause."[22]

By preserving the elements of purpose and effect from *Lemon*,[23] the endorsement analysis uses a framework familiar to school leaders and maintains the validity of past decisions that relied on *Lemon* analysis to determine the constitutionality of past practices and policies related to public education. This will help ensure no massive upheaval of Establishment Clause jurisprudence that would create a legal nightmare for schools.

Secondly, in determining whether the government is sending a message of its approval or disapproval of religion, endorsement analysis focuses on the objective observer. It asks whether the reasonable observer (familiar with the history of the community and the practice) would perceive that the particular government conduct at issue endorsed religion.

This focus on the reasonable observer allows courts to adjust the endorsement analysis to the various circumstances in which Establishment Clause issues arise in the public schools. The endorsement analysis adopts the concept of the reasonable observer because "a subjective approach would reduce the test to an absurdity." *Newdow*, 124 S.Ct. at 2321 (O'Connor, J. concurring). But the reasonable observer standard should not preclude courts from recognizing that when the observer is a student, (*e.g.*, when a high school choral class is assigned exclusively gospel music), it would be appropriate to consider the students' impressionability,

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[22] However this standard was rejected in *Bowen v. Kendrick,* 487 U.S. at 614, where the Court found that "whatever symbolic link might in fact be created by the AFLA's disbursement of funds to religious institutions is not sufficient to justify striking the statute on its face."

[23] Justice O'Connor has clearly distanced herself from the entanglement prong, stating: "I question the utility of entanglement as a separate Establishment Clause standard in most cases." *Aguilar*, 473 U.S. at 422 (O'Connor, J. dissenting.)

age and maturity, and the role of the school in educating and inculcating values. When the observer in the situation is an adult in the broader community, (*e.g.*, when public funds are distributed to religious schools, or when the local school board starts its meeting with a prayer) the analysis should consider an adult's perspective. This provides a comprehensible standard that will help schools avoid the perception of promoting or hindering religion and thereby prevent sending a message that some are outsiders to the school community.

Finally, the endorsement analysis draws attention to the fundamental requirement of the Establishment Clause that each member of the community is a full member of the community, regardless of his or her religious beliefs. This concept is critical in the public school context.

> [T]he "endorsement test" captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or—a particular religious belief is favored or preferred. *** I have framed my inquiry as a specific application of the endorsement test by examining whether the ceremony or representation would convey a message to a reasonable observer, familiar with its history, origins, and context, that those who do not adhere to its literal message are political outsiders.

Newdow, 124 S.Ct. 2301 at 2326 (O'Connor, J. concurring).

This focus on the message conveyed is particularly appropriate given the educational function of schools to inculcate democratic values in order to create a unified citizenry. (*See* Section II, *supra.*) Because the role of schools is to teach, the messages that public schools send have added significance, particularly because of their power to shape young minds. If the schools' primary purpose is to educate and inculcate values, then students should never receive the message that the school, *i.e.,* the state, is endorsing a religion or any religion or, more importantly, that the child is an "outsider".

To remove any question as to jurisprudential status of the endorsement test, *Amici* urge this Court to give its clear and official approval to the endorsement analysis and to set forth a clear framework for its application.

V. The neutrality and coercion tests are neither broad enough in scope nor sensitive enough in application to serve as a comprehensive analytical framework.

Neither the neutrality test nor coercion test comprehensively addresses the Establishment Clause issues that arise in the public school context. The neutrality test is not sufficiently sensitive to address all Establishment Clause issues that arise in public schools. Further, it is not as clear or consistent as the endorsement standard. The coercion test, al-though useful in free exercise cases, is insufficient protection within Establishment Clause cases.

The neutrality test has been used primarily in government aid cases and focuses on whether the government program at issue treats religion in a neutral

manner.[24] In *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), this Court upheld a tuition voucher program, finding it a neutral means of offering parents the ability to send their children to private (including religious) schools. In *Mitchell v. Helms,* 530 U.S. 739 (2000), a plurality of this Court declared that religiously neutral government conduct that did not favor nor disfavor religion would not violate the Establishment Clause. Justice Thomas's plurality opinion[25] asserted that the presence of private choice ensures neutrality by eliminating the possibility of attributing religious indoctrination to the state.[26]

> If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.

Mitchell v. Helms, 530 U.S. at 809.

Justice Souter's dissent in *Mitchell v. Helms* pointed out the problems with making neutrality the only constitutional test to evaluate government programs that aid religion.[27] "The Court's decisions demonstrate its repeated attempts to isolate considerations relevant to classifying particular benefits as between those that do not discernibly support or threaten support of a school's religious mission and those that cross or threaten to cross the line into support for religion." 120 S. Ct. at 2578 (Souter, J., dissenting). Justice Souter identified three main inquiries that should "complement evenhanded neutrality." First, the type of aid recipients should be

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[24] *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001) (Thomas,); Bender *v. Williamsport*, 475 U.S. 534 (1986) (Burger); *Mitchell v. Helms*, 530 U.S. 793 (2000) (Thomas).

[25] Justice O'Connor in her concurrence in *Mitchell* clearly disagreed with Thomas's neutrality test: "I write separately because, in my view, the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs. Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible." *Id.* at 837 (O'Connor, J. concurring.) However, Justice O'Connor in *Kiryas Joel* urged that *Aguilar* be reconsidered "in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity towards religion." 512 U.S. at 717-718.

[26] This same concept was referred to as a "circuit breaker" in *Santa Fe v. Doe.* In that case this Court found the students' vote was insufficient to overcome the appearance of school sponsorship of regular prayer at high school football games.

[27] However, Justice Souter referred to a neutrality standard in his majority opinion in *Kiryas Joel* in which the Court found that a distinctly separate school for the Satmar Hasidic secviolated the Establishment Clause. The law's fatal flaw was that it disregarded the mandate of neutrality toward religion required by the Establishment Clause. "Chapter 748 ... departs from this constitutional command by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that government power has been or will be exercised neutrally." 512 U.S. at 696.

examined; heightened Establishment Clause concern is required when the recipients are pervasively religious primary and secondary schools. Second, the distribution method for the aid must be scrutinized to determine whether it is direct or indirect and whether genuinely independent choice determines the path of the aid. Finally, the characteristics of the aid must be examined in detail.

While an underlying principle of the Establishment Clause, neutrality as a test affords neither clarity nor consistency. Constitutional analyses have been, within our nation's jurisprudence, enduring conceptual principles used to interpret and apply the constitutional mandates, but they must be sufficiently precise to enable consideration of the complexity of daily decisions and issues to which they are applied. The neutrality test may in part suffice to analyze the constitutionality of government aid to religious institution, but it lacks the necessary jurisprudential sensitivity needed to address the many other Establishment Clause issues that arise in public schools.

The other alternative test employed at times is the coercion test. Under this test, a court evaluates whether the government has coerced individuals into the support of religion. The coercion test provides that "at a minimum...government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so." *Lee*, 505 U.S. at 586. Under this analysis, government accommodation of religion in civic life does not violate the Establishment Clause absent some form of government coercion.

While voluntariness is a factor appropriately considered when violations of free exercise rights are asserted, it should not be used as the sole test in Establishment Clause analysis, merely to permit "accommodation" of the Nation's religious heritage. As

stated in *Engel v. Vitale*, 370 U.S. 421, 430 (1962), "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." Coercion may be an appropriate analysis in Free Exercise Clause cases, but it is not in Establishment Clause cases.

Maintaining the distinction between Establishment Clause and Free Exercise Clause analysis is especially important, given that the religious heritage of this country is extraordinarily diverse and becoming more so. The use of a coercion standard as the sole Establishment Clause analysis would mean no religious activity in public schools would offend the Establishment Clause unless students were coerced into participating in it. It would not matter how extensive the religious activities became or how offensive the activity might be to nonadherents, as long as no one was forced to actually participate. No inquiry into the religious practice itself or its effect on students would be necessary, the only consideration being whether the government coerced participation. For example, such a test could arguably permit a school to conduct a communion service at graduation, provided no one is compelled to participate in the service. Under no other Establishment Clause analysis would such a practice be constitutionally acceptable.

CONCLUSION

For 33 years, application of the *Lemon* test has produced analytical difficulties for this Court and those trying to implement its analysis on a daily basis. To compound this problem, this Court has wavered time and again from its application. If Establishment Clause

precedent continues to drift into uncertainty, schools will face the very kind of religious divisiveness against which the First Amendment is intended to guard.[28]

Amici have a strong interest in this Court framing an analytic test that will minimize the confusion that currently exists in Establishment Clause jurisprudence. Clarity and consistency will help guide public school administrators' and board members' decision-making and actions on the appropriate role of religion in the public schools. Granted, even a clear and consistent analysis is no guarantee against differences of interpretation, violations, and conflict, but public school officials would be less likely to improperly endorse religion or to inadvertently inhibit appropriate recognition of religion in public schools. This is especially important as the ethnic and religious diversity that characterizes our society fills our schools, increasing the number and complexity of these questions.

For these reasons, *Amici* urge this Court to clearly adopt an endorsement analysis for Establishment Clause cases involving public schools.

Respectfully submitted,

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[28] *See Lemon*, 403 U.S. at 622. In *Zelman* the dissenting Justices pointed out that entanglement between government and religion would give rise to social divisions based along religious lines that violated the Establishment Clause. 536 U.S. at 683 (Stevens, J. dissenting); 536 U.S. at 685 (Souter, J. joined by Stevens, Ginsburg, and Breyer, JJ., dissenting); 536 U.S. at 716 (Breyer, J. dissenting).